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MONTANA LEGISLATIVE HISTORY

Chapter 505 1989

Bill H _____ S 51 Original bill & history ✓ C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	Mar 10	✓ C	Hearing Date(s)	Jan 15	✓ C
	Mar 20	✓ C		Feb 12	✓ C
		C			C
		C			C
Date Out	Mar 20	✓ C		Feb 12	✓ C

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

LYNCH, JOHN (J.D.)			RESTITUTION AND SERVICE TO STORE OR COMMUNITY BY SHOPLIFTERS		
SB0033	1/19			TABLED	Tabled 1/30 Referred back 1/16

COMMITTEE--(S) JUDICIARY — ROOM DATE.... 04/22/87

CHAIRMAN--SEN. JOE MAZUREK
NORMAL SCHEDULE==> SITE: ROOM 325 DAYS: MON THRU FRI TIME: 10:00 A.M.
SECRETARY-MARY HUBER

--BILL NO---	REFER DATE---	HEARING DATE---	CONSIDERATION DATES----------	COMMITTEE ACTION----------	REREFERRED TO COMM----	DATE OUT-
SB0040	1/05	1/12		PASS AS AMENDED	JUDICIARY	1/13
HALLIGAN, MIKE			ALLOW CRIME VICTIMS PROGRAM TO PAY FOR MENTAL HEALTH TREATMENT FOR DEPENDENT			
SB0040	1/15			PASS AS AMENDED	Referred back on 1/15	1/13 1/19
HALLIGAN, MIKE			ALLOW CRIME VICTIMS PROGRAM TO PAY FOR MENTAL HEALTH TREATMENT FOR DEPENDENT			
SB0041	1/03	1/09		PASS AS AMENDED		1/13
PINSONEAULT,R.J.(DICK)			RURAL PUBLIC NUISANCE EXISTS IF 3 AREA RESIDENTS COMPLAIN AND ARE AFFECTED			
SB0048	1/06	1/15		PASS AS AMENDED		1/21
BROWN, ROBERT J.			PERIODIC PAYMENT OF FUTURE DAMAGES IN CIVIL SUITS OVER $50,000			
SB0049	1/06	1/14		PASS AS AMENDED		1/21
THAYER, GENE			IMMUNITY FOR OFFICERS, DIRECTORS, EMPLOYEES, & VOLUNTEERS OF NONPROFIT CORP.			
SB0050	1/06	1/14		ADVERSE REPORT		1/21
BROWN, ROBERT J.			REASONABLE ATTORNEY FEES TO BE PAID TO PREVAILING PARTY IN CIVIL ACTIONS			
SB0051	1/06	1/15		PASS AS AMENDED		2/12
BROWN, ROBERT J.			SUBSTITUTE "COMP. FAULT" FOR "COMP. NEGLIGENCE" & ELIMINATE JOINT LIABILITY			
SB0052	1/06	1/19		TABLED	Tabled 1/30	—
BROWN, ROBERT J.			ESTABLISH FLEX SYSTEM FOR REGULATION OF INSURANCE PREMIUM RATES			
SB0057	1/06	1/12		PASS AS AMENDED		1/13
HALLIGAN, MIKE			REVISING CIVIL PROCESS AND SHERIFF PROCEDURES IN CIVIL MATTERS			
SB0058	1/06	1/14		DO PASS		1/26
PINSONEAULT,R.J.(DICK)			JURY TO PICK ONE OF PROPOSED AWARDS OF PARTIES IN CIVIL ACTIONS			
SB0059	1/06	1/09		PASS AS AMENDED		1/12
GALT, JACK E.			ALLOW BANKS TO HOLD AGRICULTURAL LAND FOR 10 YEARS FOLLOWING FORECLOSURE			

SENATE BILL NO. 51

INTRODUCED BY B. BROWN

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE ON LIABILITY ISSUES

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE LAWS RELATING TO LIABILITY; SUBSTITUTING THE DOCTRINE OF COMPARATIVE FAULT FOR THE DOCTRINE OF COMPARATIVE NEGLIGENCE; ELIMINATING JOINT LIABILITY; PROVIDING FOR THE APPORTIONMENT OF FAULT AMONG JOINT TORTFEASORS; AND AMENDING SECTIONS 27-1-702 AND 27-1-703, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-1-702, MCA, is amended to read:

"27-1-702. Comparative ~~negligence~~ fault -- extent to which contributory ~~negligence~~ fault bars recovery in action for damages. (1) Contributory ~~negligence~~ fault shall not bar recovery in an action by any person or his legal representative to recover damages for ~~negligence resulting in~~ death or injury to person or property if such ~~negligence~~ contributory fault was not greater than the ~~negligence~~ fault of the person or the combined fault of all persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of ~~negligence~~ fault attributable to the person recovering or for whose death or injury to person or property recovery is made.

(2) "Fault" includes acts or omissions that are in any measure wrongful, unlawful, negligent, or reckless or that subject a person to strict tort liability. The term also includes:

(a) breach of warranty;

(b) assumption of risk;

(c) misuse of a product; and

(d) failure to avoid or mitigate an injury, including failure to use safety devices."

Section 2. Section 27-1-703, MCA, is amended to read:

"27-1-703. Multiple defendants ~~jointly and severally liable right of contribution~~ -- apportionment of fault. ~~(1) Whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.~~

~~(2) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. Whenever more than one person is found to have~~

INTRODUCED BILL

SB-51

Montana Legislative Council

~~contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, M.R.Civ.P.~~

~~(3) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party.~~

(1) In an action involving the fault of more than one person, the trier of fact shall determine the percentage of fault attributable to each person whose actions contributed to the damages. Such persons may include but need not be limited to the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant.

(2) Judgment must be entered against each defendant in an amount representing his proportionate share of the claimant's total damages unless the defendant:

(a) has been released by the claimant;

(b) is immune from liability to the claimant; or

(c) has prevailed against the claimant on any other individual defense.

(3) The liability of a defendant is several only, except that one defendant may be responsible for the fault of another if both acted in concert in contributing to the claimant's damages or if one defendant acted as an agent of the other."

-End-

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 15, 1987

The seventh meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on January 15, 1987 by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members present.

CONSIDERATION OF SB 51: Senator Bob Brown of Whitefish, Senate District #2, introduced SB 51. He said the bill amends the statute on comparative negligence by substituting the doctrine of "comparative fault" for the doctrine of "comparative negligence". He said presently in Montana law, the plaintiff does not have to claim negligence on the part of a defective product. He commented he needs to only prove that a defect caused an injury and then the manufacturer is strictly liable for any injury or damage caused. He said under existing law it is possible for a plaintiff's negligence or negligent misuse of a product to constitute 90 percent of the cause of his injury, where as the defective product might be only 10 percent of the cause. He stated the negligence of the plaintiff is not considered and he can recover fully from the product's manufacture. He explained under SB 51 the fault of the plaintiff would be compared to the fault of the seller or the manufacture of the product and his recovery would than be reduced or dropped, depending upon the percentage of his fault. Senator Brown read the types of action that produce one's own fault ((a) through (d) on page 2 of the bill). He explained Section 2 eliminates the concept of joint and several liability, except where defendants have acted in concert in contributing to a claimant's damage or if one defendant acts as an agent of another. He explained under existing law there could be three defendants who cause injury to a plaintiff and they are all liable for the full amount of the plaintiff's damages, regardless of their own percentage of liability. He explained if a plaintiff sues for $100,000 and is 10 percent at fault and each defendant is 30 percent at fault, the plaintiff can collect the entire amount from one of the defendants or any combination of them. He said that if the plaintiff collects from one defendant, that defendant has to attempt to collect the balance of the settlement from the other defendants. He said under SB 51 a jury must determine percentage of fault of each person whose action contributed to the plaintiff's damages, including the plaintiff himself. He said the plaintiff is not entitled to be compensated for the percentage of the damages that resulted from his own fault and each defendant is only liable for damages attributable to him. He stated the bill eliminates the need for the present practice of the paying defendant of having to take action to recover from other defendants, since each defendant is only liable for his own degree of fault. He

felt it made major changes in the law: comparative fault instead of comparative negligence; the plaintiff becomes responsible for his own actions; it also does away with joint and several liability.

PROPONENTS: Jim Robischon, Montana Liability Coalition, gave a list of members of the Coalition to the committee (see Exhibit 1). He felt the bill matches liability for damages to fault. He said the author of the bill, John Stephenson, of Great Falls, could not come, so he would answer any questions about the bill. He said the bill has been patterned after a Washington state bill and the Coalition feels there should be an amendment because the bill does not make it clear whether an employer's or co-employer's fault would be included in the "comparative fault pie" and the amendment would exclude employer's or co-employee's fault, so when the consideration of the fault of all the parties involved in the issue would be assigned, the employer's and co-employee's, which is under the Workmens' Comp. Act, would be excluded. He presented amendment:

> Page 3, line 22.
> Following: "Claimant."
> Insert: "Provided, however, that in attributing fault among persons, the finder of fact shall not consider or determine any amount of fault on the part of any injured person's employer or co-employee to the extent that such employer or co employee has tort immunity under the Workers' Compensation or Occupational Disease Acts of this state, or any other state, or of the federal government."

He said the question always is what is going to be the impact on availability and cost of liability insurance. He said there is no proven link between general tort reform, such as in SB 51, and availability or cost of liability insurance. He handed out a publication by Orin S. Kramer, a November 4, 1986 issue out of the The Journal Of Commerce (see Exhibit 2). He said this article deals with the issue. He stated the individuals of the Coalition could be insured in a combination of ways:

1. They could be fully insured.
2. They could be partially insured.
3. They could be under insured and only be able to afford inadequate limits.
4. They could be self insured, like the Montana Medical Association and the Montana Cites and Towns, and maybe, the Montana Bar Association.
5. They could be uninsured.

He felt SB 51 would operate for the benefit of four of these situations. He felt the bill would provide a greater opportunity of security in the modern court environment. He commented that an additional security would be in the actions taken in the investments made by a person or

organization in self-insurance programs. He believed there would be security in the knowledge that any improvement that a business organization or person made in the reduction of risks to others would probably be rewarding to the organization or person in that the fault would be reduced.

Gerald J. Neely, Montana Medical Assoication, testified in support of SB 51 (see Exhibit 3, written testimony).

Kay Foster, representing the Governor's Council on Economic Development and the Billings Chamber of Commerce supported SB 51 (see Exhibit 4, written testimony).

Alex Hanson, League of Cities and Towns testified that municipal governments provide services to the people of the state of Montana. He said they have 1,000 miles of streets and sidewalks and he said they operate utilites in most of the cities in Montana and conduct fire and building inspections; operate public buildings. He said a year ago a program began to provide insurance for the cities and towns of Montana that were not available in the commercial market. He stated the Montana Municipal Insurance authority has been set up, which provides liability coverage up to a limit of 1.5 million dollars to more than 75 cities and towns in the state. He stated we are trying to provide fair priced insurance because it is the tax payers who pay the premiums for the cities and towns. He felt SB 51 will help their effort to provide fair insurance to the state.

Kathy Irigoin, State Auditor's Office, testified for the bill with amendments attached (see amendment sheet (Exhibit 4A)). The State Auditor's office suggested that a provision be added to the bill that states joint and several liability applies if the claimant's apportioned percentage of negligence is zero, she said. She stated the reason for this is that if a claimant is not responsible for his injuries, he would be able to recover in the easiest way possible, which means going after the "deep pocket". She felt because of this reason joint and several liability should be permitted. She said the State Auditor also believes there are not many cases in which a claimant is not found to be at all responsible for his injury. The Auditor felt that the word "fault" in section 1 of this bill should be replaced with the word "negligence". She thought the bill extended too far because of the conflicting studies conducted as far as the effects of tort liablity and the cost of insurance.

Dan Hoven, Montana Municipality Insurance Authority, testifed in support of SB 51 and he said their position is to eliminate joint and several liability. He hoped joint and several will stay the way it is now in the bill. He stated this is important to the insurance authority because

of the broad responsibilities the cities and towns have in this state. He gave an example of a simple traffic accident that caused a town to be one of the defendants in a liability case because a pothole was in the area, and if the pothole had minimal involvement in the accident, the city or town, presently, can be exposed to the full recovery or has the option to settle the suit way over the amount of their true fault. He said it is only a matter of fairness that the responsibility for damages equals fault.

Lorna Frank, Montana Farm Bureau and Mountain West Farm Bureau Mutual Insurance Company, stated support for the bill (see Exhibit 5, written testimony).

Bruce Moerer, Montana School Boards Association, testified in support of the SB 51, especially in the joint and several liability section. He felt schools are willing to pay their fair share, but should not be exposed to more than that. He felt the tax payers should not have to pay for the wrong doings of others.

H.S. Hanson, Montana Technical Council, supported the bill.

OPPONENTS: John Hoyt of Great Falls, representing himself, testifed that he was not against a good business climate in Montana, but wanted to point out that elimination of joint and several liability is a popular theme today and the special session about joint and several showed the hysteria over this subject. He said a workable system of civil justice is needed. He said no one person has talked about the people that will need your help when they become injured. He presented an amendment and the reasons for it:

1. It is important that law suits are settled and litigation be brought to the lowest level possible.
2. It is important that one percent liable people are not stuck for a big payment.

He explained his amendment gives those people or entities found to be 10 percent or less negligent severally liable and not jointly. He explained they would pay in a verdict if it was 10 percent or less. If it is more than 10 percent, they are substantially negligent. He said we don't know who is going to win or lose with this bill. He stated the proponents of this bill don't know if they may be the ones who are going to suffer because there might be fights among the defenants themselves over how much and who did what. He felt this will not happen if the committee entered this 10 percent into the bill. He said it will help Mr. Neely with this. As far as changing "negligence" to "fault", it opens up a "Pandora's Box", he said. He commented that he has tried to meet with fair and knowledgeable lawyers who represent people in the coalition and insurance areas about this problem. He mentioned a meeting on December 23, 1986 in Helena and the majority of them felt joint and several

should be left in the bill with the 10 percent amendment. He stated the eliminating of joint and several all together will make the settlement of cases more difficult and the 10 percent will make it easier for settlement. He commented the bill requested by the Montana Defense Council and the Montana Trial Lawyers' bill should both be abandoned and there should not be a substitute of "comparative fault" for "comparative negligence".

Tom Lewis, President to the Montana Trial Lawyers Association, opposed SB 51 because mixing concepts of negligence with strict liability, and concepts of warranty are mixing "apples and oranges" and creating havoc to the legal system. He gave the example of a simple negligence action about a farmer who goes 7 miles to feed his cattle, but the road is icy. He said the farmer has to feed the cattle, so he assumes the risk and gets on the road and gets hit by a truck. He said his assumption of the risk becomes a defense despite the fact his conduct was reasonable. He stated the same type of analysis can apply when you talk about the simple negligence as a defense in a strict liability case. Strict liability involves a policy decision by the courts and legislators and it is well accepted in this county, he explained. It is based on the premise that the manufacturer that places the product in the stream of commerce is going to be liable for defects in that product which creates an unreasonable risk of harm to the consuming public, he said. He commented that negligence should not be a defense to that because the plaintiff doesn't have any control over that. He stated on the issue of joint and several he agreed with Mr. Hoyt and he felt the committee should compare the individual fault of the plaintiffs and defendants for the purposes of establishing whether joint and several should be applied. He said if the plaintiff is more negligent than the defendant, he can't recover anything or the defendent may be severally liable, if the plaintiff is more negligent than the individual defendant. He said if we get rid of joint and several liability, we get rid of something we have had for many years; so there are three choices: 1) Let the victim carry the burden of his harm. 2) Let the public carry the burden of harm. 3) Let the persons at fault carry the burden of harm. He felt the innocent victim is left to his own resources with this bill and the public pays for it. He felt our system of tort does justice because it states who the person is at fault; who creates the unreasonable risk; and who is negligent, bares the risk of harm; that is where it is and that is where it should remain.

Karl Englund, Montana Trial Lawyers Association, stated this is asking the jury to not only tell what each defendant did wrong, but apportion the fault to people who are not even represented in the case. He said it prevents the settling of any case in which you have multiple defendants because if you settle with one defendant, the rest of the defendants will blame the one that settled out of court. He said this bill will have to have a trial procedure against every defendant and make every case more complex and more difficult.

Zander Blewett, a lawyer from Great Falls, opposed the bill because it is a full scale change in the law and it will give the system more problems. He supported the 10 percent threshold in joint and several because it gets rid of the municipality problems, the school board problems, or any of those people that are slightly involved. He felt with this bill the whole tort system is changed. He stated that the bill actually says if you are not wearing a seat belt that that issue ought to be litigated in every automobile case. He said we are talking about having experts from both sides coming in and saying, "Well, I know he was rear ended but our expert says he wouldn't have a head injury if he had a seat belt on."

DISCUSSION ON SB 51: Senator Crippen asked Mr. Robischon to comment on Mr. Hoyt's 10 percent proposal to the joint and several part of the bill. Mr. Robischon replied that the American Bar Association Tort Reform Committee that studied the joint and several liability and the "comparative fault pie" has come up with a recommendation of 25 percent. He commented that arbitrary percentages are being debated here, whether or not the doctrine applies. Senator Crippen commented that what he gathered from Mr. Robischon's statement is he was not opposed to the concept of Mr. Hoyt's proposal, but the percentage of it. Mr. Robischon replied that the concept in SB 51 is a wide open doctrine and different percentages will effect it differently. Senator Crippen asked Mr. Hoyt where they got the idea of above 10 percent would be substantially negligent. Mr. Hoyt responded that studies in California showed that less than one percent of those persons that are defendants and multiple defendants in cases have been found to have liability less than 10 percent. He said it eliminates those who have a minimal amount of fault and it is a fictitious number, but not an arbitrary one. He echoed it was one that was arrived at after studying liability cases from all over. He said it is very important to settle cases and some attorneys are great for drawing liability cases out. Senator Crippen inquired if section 1 wasn't changed, with a plaintiff of 25 percent negligence and several defendants that were 10 to 15 percent negligence, would it still not allow the plaintiff to recover anything. Mr. Hoyt responded that under the joint and several, presently, the plaintiff would recover, but that is a gray area. Senator Crippen gave an example of 10 percent situation, which fit the Hoyt amendment. He said under the bill if the plaintiff is over 10 percent negligent, the fact is he would have to give up that 10 percent, or would he be entitled to it, or is he liable, or is there anyway to recover at all. Mr. Hoyt replied this a gray area again.

Senator Mazurek stated that would be good for the committee to run through different percentages to see how this would work.

Senator Halligan commented that he felt that mixing all of the concepts of warranty, strict liability, and product liability was a bit much. He

asked Mr. Robischon if they had discussed the confusion that may result from combining these issues. Mr. Robischon answered that expanding existing definitions to one definition of fault, and the way it effects the concept of joint and several liability, is expanding the concept of negligence to fault, and the things identified in subsection 2 are expanding the consideration of the plaintiff's involvement in the over all "fault pie". He stated if the plaintiff is going to have fault attributed to him or if his share of the "fault pie" is going to increase because of non-use of safety devises, that has to have a secondary effect upon the 10 percent tortfeasor in the case, because of the increasing claimant's share of that pie. He said the change from "negligence" to "fault" causes changes in the plaintiff's share when it comes down to what the severally liable defendants really have to account for in dollars. Senator Halligan asked what sort of social policy or judicial policy comes along with this. Mr. Robischon replied it will increase the plaintiff's fault where it has never been increased before to reduce the size of the dollar pie.

Senator Mazurek explained there will be a subcommittee appointed to this bill.

Senator Beck commented that we are trying to limit the exposure of each person to a certain amount and when we get in executive session the attorneys on both sides should remember that.

Senator Brown closed on SB 51 by stating the bill is modeled after the tort law in Washington state and it is by the recommendation of the joint committee on liability issues, which was made up of equal party members. He said the committee was in favor of this bill. He said it is critical to self insurers and their solvency and if the availability of affordable insurance is going to be a repetitious problem for Montanans in the future, then self-insurance might be the answer. He commented on Mr. Hoyt's amendment and the 25 percent threshold recommendation by saying they are arbitrary with whatever percentage one looks at and he felt that it should be discussed in trusting the jury on 10 or 25 percent or beyond that. He commented that the League of Cities and Towns, the Farm Bureau, the Govenor's Economic Council and the voters that passed Initiative 30 seem to think there should be tort reform in Montana and their wishes should be considered too. He pointed out Mr. Lewis's comment on the term "fault" being too broad, and the issue of product liability with allowing the jury to look at the misuse of a product by a plaintiff to arrive at their decision. He believed that if you have to broaden "negligence" to "fault", to do that. He pointed out Mr. Englund's point that people are at fault, but are not even defendants in the case. He quoted the language on page 3, line 17 of the bill. He said this is not necessarily anything that is going to happen, because the term "may" prevents it. He concluded by saying 25 states have already passed legislation addressing joint and several liability.

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date Jan. 15th 19

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

VISITORS' REGISTER

(SENATE) AND HOUSE COMMITTEE Jud.

BILL SB 51 DATE Jan. 15th

SPONSOR

NAME	REPRESENTING	RESIDENCE	SUPPORT	OPPOSE
Kathy Irigoin	State Auditor	Helena	X	
Jim Robischon	Mont. Link Coalition	Helena	X	
Kay Foster	Govevnor's Council Billings Chamber	Billings	X	
Roger Tippy	Montana Dental Association	Helena	X	
ROGER McGLENN	INDEPENDENT INSURANCE AGENTS ASSOC. OF MT	Helena	X	
Bob CORREA	Bozo. Chamber	Bozo	X	
Lorna Frank	Mont Farm Bureau	Bozo	X	
Bonnie Tippy	Alliance of Am Insurers	Helena	X	
Gerald J. Neely	Mont. Med. Assoc.	Billings	X	
CHIP ERDMANN	MT League of Savings Inst	Helena	X	
BRIAN ELLIS	MT. Med. Assn.	Helena	X	
Bruce W. Moerer	MSBA	Helena	X	
H.S. Hanson	MT. Tech. Council	Helena	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

SENATE JUDICIARY
EXHIBIT NO. 1
DATE Jan. 15, 1987
BILL NO. SB 51

MONTANA LIABILITY COALITION

MEMBERSHIP

Montana Home Builders Association
Professional Insurance Agents of Montana
Lewis and Clark County Medical Society
Montana Taxpayers Association
Montana Retail Association
Montana Outfitters and Guides
Montana Forward Coalition
Glendive Chamber of Commerce
Montana Chamber of Commerce
Montana Society of CPAs
Montana Bankers Association
Montana Loggers Association
Montana Building Material Dealers Association
Montana Academy of Family Physicians
Montana Innkeepers Association
Wolf Point Chamber of Commerce
Billings Chamber of Commerce
Mountain Bell
Blue Cross and Blue Shield of Montana
Montana Hospital Association
Montana Dental Association
Montana Auto Dealers Association
Ennis Chamber of Commerce
Montana Chiropractic Association
Montana Contractors Association
Montana Independent Bankers
Anaconda Chamber of Commerce
Montana Farm Bureau Federation
Montana Medical Association
Montana Motor Carriers Association
Butte Chamber of Commerce
Montana Tavern Owners Association
Miles City Area Chamber of Commerce
Missoula Chamber of Commerce
Bozeman Chamber of Commerce
Havre Chamber of Commerce
Montana Chapter, National Electrical Contractors Association
Montana Association of Defense Counsel
Montana Restaurant Association
Montana Health Care Association
Helena Area Chamber of Commerce
Montana Solid Waste Contractors, Inc.
Kalispell Chamber of Commerce
Montana Hardware & Implement Association
Montana Tire Dealers Association
Montana Office Machine Dealers Association
Independent Insurance Agents Association of Montana
Montana Petroleum Association
National Federation of Independent Business
Montana Association of Realtors

1/14/87

MONTANA FARM BUREAU FEDERATION

P.O. Box 6400
~~502 South 19th~~
Bozeman, Montana 59715
Phone (406) 587-3153

TESTIMONY BY: Lorna Frank

BILL # S.B. - 51 DATE 1/15/87

SUPPORT XXX OPPOSE _____

Mr. Chairman, members of the committee, for the record, my name is Lorna Frank, representing Montana Farm Bureau and Mountain West Farm Bureau Mutual Ins. Co. with some 3500 members in Montana.

Farm Bureau members support S.B. - 51 since it determines the liability of each of several defendants by comparing their fault with each defendant paying his proportionate share.

I urge this committee to give S.B. 51 a do pass recommendation. Thank you.

SENATE JUDICIARY
EXHIBIT NO. 5
DATE Jan. 15, 1987
BILL NO. SB 51

SIGNED: Lorna Frank

SENATE JUDICIARY
EXHIBIT NO. 4A
DATE Jan. 15, 1987
BILL NO. SB 51

Proposed Amendment to SB 51

1. Title, lines 7 through 9.
Strike: "SUBSTITUTING THE DOCTRINE OF COMPARATIVE FAULT FOR THE DOCTRINE OF COMPARATIVE NEGLIGENCE;"

2. Title, line 9.
Strike: "ELIMINATING"
insert: "REVISING"

3. Page 1, line 14.
Strike: section 1 in its entirety
Renumber: subsequent sections

4. Page 2, line 11 through line 13, page 3.
Strike: line 11, page 2 through line 13, page 3

5. Page 3, line 14.
Before: "(1)"
Insert: "NEW SECTION. Section 1. Multiple defendants--apportionment of negligence."

6. Page 3, line 14.
Strike: "fault"
Insert: "negligence"

7. Page 3, line 16.
Strike: "fault"
Insert: "negligence"

8. Page 3, line 23.
Strike: "Judgment"
Insert: "Except as provided in subsection (3) and [section 2], judgment"

9. Page 4, line 6.
Strike: "fault"
Insert: "negligence"

10. Page 4.
Following: line 9
Insert: "Section 2. Section 27-1-703, MCA, is amended to read:
"27-1-703. Multiple defendants jointly and severally liable--right of contribution. (1) Whenever the negligence of any party in any action is an issue and the claimant's apportioned percentage of negligence is zero, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.
(2) [illegible]
(3) [illegible]"

EXHIBIT NO. 3
DATE Jan. 15, 1987
BILL NO. SB 51

1. JOINT & SEVERAL LIABILITY

A. SUMMARY OF LEGISLATIVE PROPOSAL

▪ Proportionate liability of persons being sued -- the defendant in a court case -- based on the degree of their fault.

B. INTRODUCTION

WHAT IS "JOINT AND SEVERAL LIABILITY"?

Under "joint and several" liability, a plaintiff - negligent himself - who sues more than one defendant can collect the entire judgment from a defendant who was less negligent than all other defendants, and even less negligent than the plaintiff himself. And to the extent the other defendants are insolvent, the less-negligent defendant has to foot the entire bill.

The law allows a division of fault between a negligent plaintiff and the defendants (through comparative negligence) and allows division of fault among the defendants (through contribution), but will not allow a division of damages based on fault among all the negligent parties, including the plaintiff.

A negligent plaintiff is made "whole", while making a solvent defendant incur liability in excess of his proportionate fault and bear the entire burden of an insolvent co-defendant. The courts inflict an injury on the solvent defendant in excess of his proportionate fault, even when the plaintiff's negligent conduct was also a factor in inflicting the injury on himself.

The "joint and several liability" concept is at the root of escalating settlements and verdicts facing cities, school districts, parks and other government entities. The public, through increased taxes, pays directly for any disproportionate liability imposed by the joint liability rule.

For physicians and their patients, it is a vital topic because many physicians are members of single-line physician-owned carriers selling medical liability insurance and highly dependent on a volatile reinsurance market adversely affected by the presence of the joint and several concept.

WILL PROPER LEGISLATION HAVE A DOWNWARD IMPACT ON PREMIUMS OR IMPROVE THE AVAILABILITY OF INSURANCE?

Responsible authorities believe changes in the "joint and several" liability concept will help to bolster the reinsurance market, a market which is so important to single line policyholder-owned insurance companies.

Independent actuaries have estimated in California that the passage of the California initiative could favorably affect professional liability premiums by as much as 5%.

The fiscal impact report by the Legislative Analyst and State Finance Director of California, in the official title and summary of the California initiative, estimated the savings to state and local governments "could be several millions of dollars annually, but may fluctuate significantly annually, depending on size of claims paid." The California initiative was limited to non-economic damages, and a measure not so limited could be expected to have a greater impact.

C. POLICY REASONS FOR LEGISLATIVE PROPOSALS

The proposed legislation will:

- Cause a reduction of the infliction of injury by the courts on defendants in excess of their proportionate fault

- Cause a reduction in cases involving contribution from joint tortfeasors

- There are objective, scientific reasons to believe that passage the legislation will have a demonstrable downward impact on premiums and further insure the availability of insurance.

D. FURTHER BACKGROUND ON TOPIC

HAVE OTHER STATES ACTED IN THE AREA OF JOINT AND SEVERAL LIABILITY?

Twenty-five states have eliminated or in some way restricted application of the joint and several rule. 1

Those states have acted with legislation which provides for:

- Proportionate share of fault as to all defendants for all damages. 2

- Proportionate share of fault as to all defendants for all damages where a plaintiff is at all negligent. 3

- Proportionate share of fault as to all defendants for non-economic damages. 4

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1 California, Colorado, Indiana, Iowa, Louisiana, Kansas, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Texas, and Vermont are discussed in the following materals. Alaska, Connecticut, Florida, Michigan, West Virginia, Colorado, Missouri, Utah, Washington, Wyoming made modifications in 1986, and the comments herein do not include 1986 bills.

2 Indiana, Kansas, New Hampshire, New Mexico, and Vermont.

3 Oklahoma

4 California

SENATE JUDICIARY
EXHIBIT NO. 3
DATE 1-15-87
BILL NO. S.B. 513

- Proportionate share of fault as to any defendant whose negligence is less than that of a plaintiff's. 5

- Proportionate share of fault as to any defendant who is bears less than 50% of the total fault, including the plaintiff's. 6

- Defendants jointly liable only with other defendants who are proportionately less negligent. 7

- Retention of joint and several liability, but reallocation of insolvent defendant's liability among all negligent parties, including the plaintiff's. 8

Prepared by the Montana Medical Association, 2021-11th Ave., Helena, Montana 59601, G. Brian Zins, Executive Director, 406-443-4000. 1/87	LEGISLATIVE PROPOSALS - JOINT & SEVERAL LIABILITY

5 Colorado, Louisiana, Nevada, and Texas

6 Iowa

7 Missouri. Thus, if the jury deems defendant "A" 20% negligent, defendant "B" 30% negligent, and defendant "C" 50% negligent, the result is that:

C: jointly liable for 100% of damages
B: liable for 50% of damages (B plus A's negligence)
A: liable for 20% of damages

8 Minnesota. The end result of this approach is that defendants generally remain jointly and severally liable, but a plaintiff's recovery will be reduced by: (1) his own negligence; (2) his proportionate share of a defendant's insolvency.

Redefining Tort Reform Deba

Tort law is, quite properly, blind to the very existence of insurance; taking into account the economic status of the parties would repudiate the principle of equal protection.

By ORIN S. KRAMER

(Second of Two Articles)

The central question facing those studying tort reform and the insurance industry is how we move to redefine the public debate in 1987 and beyond.

My own thought is that those who care about the health of the insurance mechanism and how we handle risk would want to convert what has historically been a cyclical "crisis" issue, where the debate operated within fairly narrow intellectual parameters, into a much more fundamental discussion.

This discussion would focus on the very purposes of the civil justice system, and where the objective is to institutionalize that discussion as part of the ongoing public agenda. That discussion would revolve around five fundamental questions:

- How much risk do we want to tolerate in society — to what extent is it desirable or economically feasible in a competitive world economy to seek a zero risk environment?
- How much to pay people with injuries?
- Who should pay?
- Who should be paid?
- What mechanism should we use to deliver that money?

Those issues have two characteristics. The first is that they are primary issues that should be explicitly addressed, but they're so far-reaching that they tend to get avoided. So we end up proceeding as if there were a consensus on basic principles when few people have examined these principles. Then we're surprised when the failure to articulate the goals produces a stalemate on policy.

The second characteristic of these first-order issues is that they are issues on which there is no single, "right" answer, and they are issues on which nobody's going to get a resolution in 1987 or 1988. They are fundamental questions, the answers to which revolve around subjective judgments on the nature of justice and how much society elects to invest in liability protection.

Proponents of the status quo argue we should permit those answers to evolve through the courts. I would argue that case law is unsuited to take into account the systemic effects of legal principles, and the effects on insurance are a case in point.

Tort law is, quite properly, blind to the very existence of insurance; taking into account the economic status of the parties would repudiate the principle of equal protection. But that blindfold numbs the sensitivity of the judicial system to the health of the risk-spreading mechanism that ultimately determines whether a paper verdict produces a real recovery.

If the long-term dialogue centered around the basic issues outlined above, we could begin to ask the real questions:

- What's the problem? Is it predictability, or predictability and cost, or the absence of deterrence?
- Is it the arbitrariness of the system — and if so, is the problem that some get too much, or some get too little, or that it takes too long to get it?
- How much risky conduct do we want to deter?
- To what extent should the tort system, as opposed to government regulation, be our vehicle for deterring unreasonably risky conduct?
- Do we really want to compensate most forms of injury absent a finding of fault? If we do want broad compensation, is no-fault an answer?

If we want to deter negligent conduct through the tort system, then we should predicate recovery on a finding of negligence. If society insists on compensating certain classes of injury irrespective of negligence, then there are cheaper, faster and fairer ways to do so than through the tort system.

You can make a philosophical case for either approach. You can achieve deterrence through a fault-based tort system. Or you can achieve broader compensation through no-fault and broader safety nets, and rely on government regulation and the criminal law for deterrence. But you can't achieve both objectives through the same tort system without putting intolerable strain on that system.

The reluctance to discuss those first-order issues is understandable because they're so far-reaching, and because the implication is either (a) that you revert to a pure fault system and leave injured parties without compensation, or (b) that you move to a no-fault approach that involves broader government safety nets and perhaps a greater cost than this country would find acceptable. That's not an easy choice, but I'd submit that if you don't find vehicles to introduce these issues as part of the public dialogue we're inevitably left with what we have today:

- A system that's eroding the international competitiveness of our economy.
- A system with minimal deterrence.
- A system with uneven levels of compensation.
- A system that's high on cost.
- A system that lacks the requisite predictability to make the risk-sharing insurance mechanism work.

Orin S. Kramer, an attorney and consultant, was vice chairman and executive director of the New York State Advisory Commission on Liability Insurance.

THE JOURNAL OF COMMERCE, Tuesday, November 4, 1986

The Issues Behind Tort Reform

The reality is that the recovery won't cure the crisis: There's a capacity shortage at least through 1988, and the predicate to the recovery is that companies are repricing or avoiding the problem lines.

By ORIN S. KRAMER

(First of a Two Articles)

In drafting the New York Advisory Commission report on liability insurance, a central objective was to separate out the broad, philosophical questions about the purpose of the civil justice system — questions to which there are no definitive answers — from the issues for which a reasonably verifiable answer exists. Nothing would advance the public dialogue more than excising this latter category of false issues from the current debate. Let me suggest three persistent issues where the facts should be stipulated.

First, the industry's earnings recovery. The issue is whether the recovery will cure the crisis and obviate the need for tort reform.

The reality is that the recovery won't cure the crisis: There's a capacity shortage at least through 1988, and the predicate to the recovery is that companies are repricing or avoiding the problem lines. Full availability of coverage for insurable risks should return by early 1987. But significant price reductions are not foreseeable over the intermediate term.

Even if we were about to witness a surge of new capacity sufficient to reduce rates, it would still be irrelevant to the merits of tort reform. The essential argument for tort reform is that as a nation we are making an excessive investment in satisfying liability obligations, and that that investment undermines our international competitiveness, inhibits productive activity, imposes hardship and threatens the health of the insurance mechanism. Whether we as a society are putting too many dollars in the compensation basket is a legitimate point of contention, but that is the question around which the debate should revolve. The issue is not whether on the day we enact long-term changes in our civil justice system, an industry that is incontrovertibly cyclical happens to be in its recovery phase, at its peak, or [illegible]dir.

Second, what do we know bout the behavior of liability costs?

We know there have been misstatements. Our so-called litigation explosion is no more severe than Western Europe's. Most of the increase in civil cases has been in family law, personnel and entitlement actions, not torts. The median settlement hasn't risen dramatically.

What should be indisputable is that beginning around 1980, aggregate civil liability costs accelerated rapidly, driven not by an increase in the median claim, but by the exponential growth of the small minority of claims above $100,000. There is ample documentation of that proposition in our report. The experience of self-insureds corroborates that the cost explosion is not an artifact of the insurance market.

What's driving these larger cases? It's not an explosion of hazard and risk. With the exception of the inhalation of toxics, all death rates for accidents, including medical procedures, are down. It's not wage inflation or health-care costs — the cost surge exceeds any inflation index. The cost surge reflects three forces:

- An upward revaluation of social concepts of the dollar value of intangible injury;
- The evolution from a body of law aimed at deterring unreasonably risky activity to legal doctrines with a primary concern for full compensation of injuries; and
- A dramatic rise in transaction costs exceeding even the rate of increase in payments to claimants.

In effect, judges and juries — operating without budgetary constraints — have levied what amounts to a massive tax on society, a tax which at its heart reflects increasing social intolerance of unbuffered risk. If we view that cost increase as a problem, it is not an insurance mechanism problem but a liability problem.

The final issue: Is there a demonstrated, quantifiable linkage between tort reform and premium rates? If not, should we defer tort reform until that linkage is empirically established?

There is no reliable research establishing a quantitative linkage between tort law change and insurance prices. There is some data on the cost savings produced by specific tort reforms, but not on the translation of those savings into prices. There are three reasons why: There are few dispassionate professionals in this field; the research is difficult and complex; and, prior to this year, there wasn't much general tort reform, as opposed to specialized tort reform involving health-care providers. Moreover, because insurance pricing reflects so many variables beyond tort costs, there will probably never be a model that can predict the effect of tort law changes on insurance rates.

But quantitative evidence on the linkage should not govern the debate. We do have empirical evidence that tort reform reduces liability costs. We do know that in competitive markets with low entry barriers, cost changes will exert pricing pressure in the same direction. There may not be a 1:1 relationship between tort law change and insurance pricing at any one point in time. But over the long haul, the liability cost structure will determine how much insurance is written and at what price.

Orin S. Kramer, an attorney and consultant who served in the Carter administration, was vice chairman and executive director of the State of New York Advisory Commission on Liability Insurance.

SENATE JUDICIARY
EXHIBIT NO. 2
DATE Jan. 15, 1987
BILL NO. SB 51

SB 51

The Council urges approval of the elimination of joint and several liability as presented in Section 2 of SB 51.

Although we made no recommendation regarding comparative fault as outlined in Section 1 of this bill, the Council specifically recommended that the legislature change Montana's doctrine of join and several liability so that defendants will be responsible only to the degree that they are found to be negligent.

The specific task of the Insurance Subcommittee of the Governor's Council on Economic Development was to study the liability insurance crisis in Montana and present recommendations to the Governor and Legislature which would increase the affordability of liability insurance. In almost all circumstances the recommendations do not just offer the insurance industry but involves basic changes in Montana's system of civil justice.

Our conclusion was that the elimination of joint and several liability and return to a fault based system of damage assessment would make Montana more attractive to insurors and, consequently, add some stability to Montana business and governmental units.

SENATE JUDICIARY
EXHIBIT NO. 4
DATE Jan. 15, 1987
BILL NO. SB 51

NAME: Clip ERDMANN DATE: 1/15/89

ADDRESS: Helena

PHONE: 442-8813

REPRESENTING WHOM? MT League of Financial Institutions

APPEARING ON WHICH PROPOSAL: SB 51

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: The Legislative Committee of the Savings and Loan League met and discussed the various tort reform bills. They voted to strongly support SB 51 and the concept it contains to eliminate joint & several liability.

- J & Several liability is an inequitable concept - damages should be equal to fault
- this is an overdue revision and will be a big step in making Montana a better place to do business

- We urge your favorable consideration of SB 51

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

STANDING COMMITTEE REPORT

February 12 19 87

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration SENATE BILL No. 51

first reading copy (white color)

Substitued "comp. Fault" for "comp. negligence" and eliminate joint liability.

Respectfully report as follows: That SENATE BILL No. 51

1. Title, lines 7 through 9.
Following: "LIABILITY;" on line 7
Strike: the remainder of line 7 through "NEGLIGENCE;" on line 9

2. Title, lines 9 through 10.
Following: "LIABILITY" on line 9
Strike: the remainder of line 9 through "TORTFEASORS" on line 10
Insert: "IN CERTAIN CASES"

3. Page 1, line 15.
Following: "~~negligence~~"
Strike: "fault"
Insert: "negligence"

4. Page 1, line 16.
Following: "~~negligence~~"
Strike: "fault"
Insert: "negligence"

5. Page 1, line 17.
Following: "damages."
Strike: (1)"
Following: "~~negligence~~"

XXXXXXX
DO PASS CONTINUED

~~XXXXXXXXXX~~
~~DO NOT PASS~~

~~SENATOR~~ Maturek (Senator) Chairman.

Strike: "fault"
Insert: "negligence"

6. Page 1, line 20.
Following: "in"
Insert: "negligence resulting in"

7. Page 1, line 21.
Following: line 20
Strike: "contributory fault"
Insert: "negligence"
Following: "negligence"
Strike: "fault"
Insert: "negligence"

8. Page 1, line 22.
Following: "combined"
Strike: "fault"
Insert: "negligence"

9. Page 1, line 25.
Following: line 24
Strike: "fault"
Insert: "negligence"

10. Page 1, line 25 through line 1, page 2.
Following: "recovering" on line 25
Strike: the remainder of line 25 through "made" on line 1, page 2

11. Page 2, lines 2 through 10.
Following: line 1
Strike: subsection (2) in its entirety

12. Page 2, line 13.
Following: "contribution"
Strike: "-- apportionment of fault"
Insert: "-- determination of liability"

13. Page 3, line 14 through line 9, page 4.
Strike: subsections (1) through (3) in their entirety
Insert: "(1) Except as provided in subsections (2) and (3), whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be

awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) Any party whose negligence is determined to be 25% or less of the combined negligence of all persons described in subsection (4) is severally liable only and is responsible only for the amount of negligence attributable to him, except as provided in subsection (3). The remaining parties are jointly and severally liable for the total less the amount attributable to the claimant.

(3) A party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

(4) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. The trier of fact shall apportion the percentage of negligence of all such persons. However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government. Contribution shall be proportional to the liability of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, ~~XXXXXXXXXXXX~~Montana Rules of Civil Procedure.

(5) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party. A

party found to be 25% or less negligent for the injury complained of is liable for contribution under this section only up to the percentage of negligence attributed to him.

NEW SECTION. Section 3. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

7033c/L:JEA\WP:jj (rev. 7034)

AND AS AMENDED
DO PASS

OPPONENTS: There were none.

DISCUSSION ON HOUSE BILL 82: Senator Blaylock asked if the bills presented today will fix all the problems. Rep. Brown said the bills will help, but there will be more problems to come she is sure.

Senator Mazurek asked if this bill gives the department the right to compromise child support payments. Mr. Mc Rae said it's not unusual to compromise, but the department can't compromise any money portion that comes to the mother or AFDC from payments because the department doesn't represent these groups.

Rep. Brown closed the hearing on HB 82.

EXECUTIVE ACTION

ACTION ON SENATE BILL 51: Senator Mazurek explained what the subcommittee did at the 9:00 a.m. meeting this morning.

Senator Brown showed the committee the gray bill they worked with at the 9 o'clock meeting. (Exhibit 7) Senator Brown moved to reconsider the committee's previous action on the bill. The motion carried. Senator Brown then moved to strike all amendments made in earlier meetings on SB 51. The motion carried. The bill is now the introduced bill.

Senator Mazurek said amendments were attached to the gray bill. He said on page 1, the plaintiff's negligence will be compared to all defendant's negligence. He said the plaintiff's negligence has to be 51% before be cannot recover.

Senator Mazurek explained what (1) and (2) on page 4 of the gray bill are. He said any party who is 25% negligent, or less, will be responsible for his part of the negligence. He said anyone who is above 25% is jointly/severally liable. He said if a defendant who is 30% negligent, and two other defendants are each 15% negligent, and the 30% defendant is insolvent, then the plaintiff can only recover from the two defendants that are each 15% negligent.

Senator Mazurek explained sub 3 of the gray bill. He said the formula we will use is: a plaintiff is 40% negligent, defendant is 30% negligent, and defendants each are 15% negligent. He said "acting in concert", is two employees of a city are working together and are 15% each at fault.

He said a plaintiff could not increase the "acting in concert" total over 30% in this case to just one of the 15% defendant because if the plaintiff asked for the "act in concert" percentage to go to one of the defendants, it makes his fault double and causes him to be jointly and severally liable. He explained the bill will allow one of the defendants "acting in concert" to take the full amount of the two combined but that defendant will not be liable for the full amount.

Senator Crippen asked if "acting in concert" is in the bill now. Senator Mazurek said no. Senator Crippen asked where two street cleaners are "acting in concert" if they are cleaning a street together about 1/2 hour apart.

Senator Halligan said if an indivisable injury happens after two guys hit you, they were "acting in concert". He said one looks on the injury issue besides the conspiracy issue.

Senator Crippen asked to describe unauthorized acts and an authorized act when "acting in concert". Mr. Karl Englund, Montana Trial Lawyers Assn., said there may be situations where something wasn't technically authorized, but yet in the course of the work, it must be done. He said it depends on the nature of the work. Mr. Englund said the "acting in concert" deals with the responsibility of one person to pay the judgment on behalf of the other.

Senator Yellowtail asked what the rationale for treating concert the accumulative liability as severally liable. Ms. Lane said it treats it jointly liable, not severally liable. Ms. Lane said it is strictly a policy decision.

Senator Mazurek discussed sub 4 of the gray bill. He used the same example of the plaintiff being 40%, defendant 30%, and two defendants 15% each. He said on line 17 of page 5 of the gray bill, it tells who will be part of the "fault pie". He explained both sides don't care for the "empty chair" issue. He said if you cannot compare defendant 2 (15%) because he is not in the trial, the introduced bill would split the 15% up between the other two defendants. He said the "empty chair" doesn't allow the plaintiff to get full compensation. He felt the sub-committee thought it was unfair to the two defendants to split negligence they did not commit. Senator Yellowtail asked if the gray bill doesn't allow the split of the "empty chair's" fault, then the plaintiff will have to bring in all defendants who had any fault, to be fully compensated.

Senator Mazurek said on page 5, lines 2-5, the subcommittee took that language and moved it to subparagraph 5 on page 6. He said the committee also deleted the words on page 6, line 11 "who are jointly liable". He said they did this because they moved the other language.

Senator Mazurek said there were significant things done: 1) clarified who negligence is compared against the plaintiff's negligence; 2) eliminated joint/several liable when a defendant is 25% or less at fault; and 3) who the jury looks at when assigning negligence, which is everyone.

Senator Crippen asked what happened to product liability. Senator Mazurek thought it "bogged down" the bill so the subcommittee decided against it. Senator Crippen gave an example of going to visit Senator Yellowtail's ranch and he has been drinking and hits a cattleguard and is injured. Senator Crippen said there could be a lawsuit with negligence on Senator Yellowtail, the cattleguard manufacturer, the person that installed the guard, and being a county road, the county is in it too. He said the court finds me 49% negligent. He said Senator Yellowtail is 15% negligent and still, even though my negligence is 3 times more than Senator Yellowtail, I can still collect from him. Senator Mazurek said that is the way the bill came in.

Senator Brown moved that the committee adopt the gray bill as amendments for Senate Bill 51 with the changes the subcommittee made in the 9 o'clock meeting. Senator Yellowtail thought the "acting in concert" defendants should be held jointly liable if their percentage together exceeds 25%.

Senator Crippen commended the subcommittee. Senator Pinsoneault asked what it will do to insurance rates. The committee didn't really know. The motion carried.

Senator Brown moved Senate Bill 51 DO PASS AS AMENDED. The motion carried unanimously.

Senator Halligan moved to have a committee bill drafted for a products liability bill. The motion carried.

SENATE JUDICIARY
EXHIBIT NO. 7
DATE Feb 12, 1987
BILL NO. SB 51

50th Legislature SB 0051/gray/02

SENATE BILL NO. 51

INTRODUCED BY B. BROWN

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE

ON LIABILITY ISSUES

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE LAWS RELATING TO LIABILITY; ~~SUBSTITUTING THE DOCTRINE OF COMPARATIVE FAULT FOR THE DOCTRINE OF COMPARATIVE NEGLIGENCE~~; ELIMINATING JOINT LIABILITY; ~~PROVIDING FOR THE APPORTIONMENT OF FAULT AMONG JOINT TORTFEASORS~~ IN CERTAIN CASES; AND AMENDING SECTIONS 27-1-702 AND 27-1-703, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1 . Section 27-1-702, MCA, is amended to read:

"27-1-702. Comparative ~~negligence~~ ~~fault~~ NEGLIGENCE -- extent to which contributory ~~negligence~~ ~~fault~~ NEGLIGENCE bars recovery in action for damages. ~~(1)~~ Contributory ~~negligence~~ ~~fault~~ NEGLIGENCE shall not bar recovery in an action by any person or his legal representative to recover damages for ~~negligence resulting in~~ NEGLIGENCE RESULTING IN death or injury to person or property if such ~~negligence~~ ~~contributory fault~~ NEGLIGENCE was not greater than the ~~negligence~~ ~~fault~~ NEGLIGENCE of the person or the combined ~~fault~~ NEGLIGENCE of all persons against whom recovery is

sought, but any damages allowed shall be diminished in the proportion to the amount of ~~negligence~~ fault NEGLIGENCE attributable to the person recovering ~~or for whose death or injury to person or property recovery is made~~.

~~(2) "Fault" includes acts or omissions that are in any measure wrongful, unlawful, negligent, or reckless or that subject a person to strict tort liability. The term also includes:~~

~~(a) breach of warranty;~~

~~(b) assumption of risk;~~

~~(c) misuse of a product; and~~

~~(d) failure to avoid or mitigate an injury, including failure to use safety devices.~~"

Section 2. Section 27-1-703, MCA, is amended to read:

"27-1-703. Multiple defendants ~~jointly and severally liable — right of contribution — apportionment of fault~~ -- DETERMINATION OF LIABILITY. ~~(1) Whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.~~

~~(2) On motion of any party against whom a claim is~~

SENATE JUDICIARY
EXHIBIT NO. 7
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~~asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, M.R.Civ.P.~~

~~(3) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party.~~

~~(1)~~ In an action involving the fault of more than one person, the trier of fact shall determine the percentage of fault attributable to each person whose actions contributed to the damages. Such persons may include but need not be limited to the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant,

SENATE JUDICIARY
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~~and any other persons who have a defense against the claimant.~~

~~(2) Judgment must be entered against each defendant in an amount representing his proportionate share of the claimant's total damages unless the defendant:~~

~~(a) has been released by the claimant;~~

~~(b) is immune from liability to the claimant; or~~

~~(c) has prevailed against the claimant on any other individual defense.~~

~~(3) The liability of a defendant is several only, except that one defendant may be responsible for the fault of another if both acted in concert in contributing to the claimant's damages or if one defendant acted as an agent of the other.~~ (1) EXCEPT AS PROVIDED IN SUBSECTIONS (2) AND (3), WHENEVER THE NEGLIGENCE OF ANY PARTY IN ANY ACTION IS AN ISSUE, EACH PARTY AGAINST WHOM RECOVERY MAY BE ALLOWED IS JOINTLY AND SEVERALLY LIABLE FOR THE AMOUNT THAT MAY BE AWARDED TO THE CLAIMANT BUT HAS THE RIGHT OF CONTRIBUTION FROM ANY OTHER PERSON WHOSE NEGLIGENCE MAY HAVE CONTRIBUTED AS A PROXIMATE CAUSE TO THE INJURY COMPLAINED OF.

(2) ANY PARTY WHOSE NEGLIGENCE IS DETERMINED TO BE 25% OR LESS OF THE COMBINED NEGLIGENCE OF ALL PERSONS DESCRIBED IN SUBSECTION (4) IS SEVERALLY LIABLE ONLY AND IS RESPONSIBLE ONLY FOR THE AMOUNT OF NEGLIGENCE ATTRIBUTABLE TO HIM, EXCEPT AS PROVIDED IN SUBSECTION (3). THE REMAINING

SENATE JUDICIARY
EXHIBIT NO. 7
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PARTIES ARE JOINTLY AND SEVERALLY LIABLE FOR THE TOTAL LESS THE AMOUNT ATTRIBUTABLE TO THE CLAIMANT. A PARTY FOUND TO BE 25% OR LESS NEGLIGENT FOR THE INJURY COMPLAINED OF IS LIABLE FOR CONTRIBUTION UNDER THIS SECTION ONLY UP TO THE PERCENTAGE OF NEGLIGENCE ATTRIBUTED TO HIM.

(3) A PARTY MAY BE JOINTLY LIABLE FOR ALL DAMAGES CAUSED BY THE NEGLIGENCE OF ANOTHER IF BOTH ACTED IN CONCERT IN CONTRIBUTING TO THE CLAIMANT'S DAMAGES OR IF ONE PARTY ACTED AS AN AGENT OF THE OTHER.

(4) ON MOTION OF ANY PARTY AGAINST WHOM A CLAIM IS ASSERTED FOR NEGLIGENCE RESULTING IN DEATH OR INJURY TO PERSON OR PROPERTY, ANY OTHER PERSON WHOSE NEGLIGENCE MAY HAVE CONTRIBUTED AS A PROXIMATE CAUSE TO THE INJURY COMPLAINED OF MAY BE JOINED AS AN ADDITIONAL PARTY TO THE ACTION. FOR PURPOSES OF DETERMINING THE PERCENTAGE OF LIABILITY ATTRIBUTABLE TO EACH PARTY WHOSE ACTION CONTRIBUTED TO THE INJURY COMPLAINED OF, THE TRIER OF FACT SHALL CONSIDER THE NEGLIGENCE OF THE CLAIMANT, INJURED PERSON, DEFENDANTS, THIRD-PARTY DEFENDANTS, PERSONS RELEASED FROM LIABILITY BY THE CLAIMANT, PERSONS IMMUNE FROM LIABILITY TO THE CLAIMANT, AND ANY OTHER PERSONS WHO HAVE A DEFENSE AGAINST THE CLAIMANT. THE TRIER OF FACT SHALL APPORTION THE PERCENTAGE OF NEGLIGENCE OF ALL SUCH PERSONS. HOWEVER, IN ATTRIBUTING NEGLIGENCE AMONG PERSONS, THE FINDER OF FACT MAY NOT CONSIDER OR DETERMINE ANY AMOUNT OF

SENATE JUDICIARY
EXHIBIT NO. 7
DATE 2-12-87
BILL NO. S.B. 51

NEGLIGENCE ON THE PART OF ANY INJURED PERSON'S EMPLOYER OR COEMPLOYEE TO THE EXTENT THAT SUCH EMPLOYER OR COEMPLOYEE HAS TORT IMMUNITY UNDER THE WORKERS' COMPENSATION ACT OR THE OCCUPATIONAL DISEASE ACT OF THIS STATE, OF ANY OTHER STATE, OR OF THE FEDERAL GOVERNMENT. CONTRIBUTION SHALL BE PROPORTIONAL TO THE LIABILITY OF THE PARTIES AGAINST WHOM RECOVERY IS ALLOWED. NOTHING CONTAINED IN THIS SECTION SHALL MAKE ANY PARTY INDISPENSABLE PURSUANT TO RULE 19, M.R.CIV.P.

(5) IF FOR ANY REASON ALL OR PART OF THE CONTRIBUTION FROM A PARTY LIABLE FOR CONTRIBUTION CANNOT BE OBTAINED, EACH OF THE OTHER PARTIES WHO ARE JOINTLY LIABLE SHALL CONTRIBUTE A PROPORTIONAL PART OF THE UNPAID PORTION OF THE NONCONTRIBUTING PARTY'S SHARE AND MAY OBTAIN JUDGMENT IN A PENDING OR SUBSEQUENT ACTION FOR CONTRIBUTION FROM THE NONCONTRIBUTING PARTY.

NEW SECTION. SECTION 3. SEVERABILITY. IF A PART OF THIS ACT IS INVALID, ALL VALID PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF THIS ACT IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS."

SENATE JUDICIARY
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Proposed Amendments to SB 51

25% THRESHOLD

1. Title, lines 7 through 9.
Following: "LIABILITY;" on line 7
Strike: the remainder of line 7 through "NEGLIGENCE;" on line 9

2. Title, lines 9 through 10.
Following: "LIABILITY" on line 9
Strike: the remainder of line 9 through "TORTFEASORS" on line 10
Insert: "IN CERTAIN CASES"

3. Page 1, line 15.
Following: "~~negligence~~"
Strike: "fault"
Insert: "negligence"

4. Page 1, line 16.
Following: "~~negligence~~"
Strike: "fault"
Insert: "negligence"

5. Page 1, line 17.
Following: "damages."
Strike: (1)"
Following: "~~negligence~~"
Strike: "fault"
Insert: "negligence"

6. Page 1, line 20.
Following: "~~in~~"
Insert: "negligence resulting in"

7. Page 1, line 21.
Following: line 20
Strike: "contributory fault"
Insert: "negligence"
Following: "~~negligence~~"
Strike: "fault"
Insert: "negligence"

8. Page 1, line 22.
Following: "combined"
Strike: "fault"
Insert: "negligence"

9. Page 1, line 25.
Following: line 24
Strike: "fault"
Insert: "negligence"

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10. Page 1, line 25 through line 10, page 2.
Following: "recovering" on line 25
Strike: the remainder of lines 25 through line 10, page 2 in their entirety

11. Page 2, line 13.
Following: "~~contribution~~"
Strike: "-- apportionment of fault"
Insert: "-- determination of liability"

12. Page 3, line 14 through line 9, page 4.
Strike: subsections (1) through (3) in their entirety
Insert: "(1) Except as provided in subsections (2) and (3), whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) Any party whose negligence is determined to be 25% or less of the combined negligence of all persons described in subsection (4) is severally liable only and is responsible only for the amount of negligence attributable to him, except as provided in subsection (3). The remaining parties are jointly and severally liable for the total less the amount attributable to the claimant. A party found to be 25% or less negligent for the injury complained of is liable for contribution under this section only up to the percentage of negligence attributed to him.

(3) A party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

(4) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. The trier of fact shall apportion the percentage of negligence of all such persons. However, in attributing negligence among persons, the finder of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government. Contribution shall be

SENATE JUDICIARY
EXHIBIT NO. 7
DATE 2-12-87
BILL NO. S.B. 51

proportional to the liability of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, M.R.Civ.P.

(5) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties who are jointly liable shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party.

NEW SECTION. Section 3. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

7033c/L:JEA\WP:jj (rev. 7034)

SENATE JUDICIARY
EXHIBIT NO. 7
DATE 2-12-87
BILL NO. S.B. 51

STANDING COMMITTEE REPORT

HOUSE

MARCH 20, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 51

☐ do pass ☐ do not pass

☒ be concurred in ☐ be not concurred in

☒ as amended ☐ statement of intent attached

Earl Lory
Chairman

Amendments to SB 51
Blue Third Reading copy

1. Title, lines 10 and 11.
Following: "~~REPEASORS~~" on line 10
Strike: remainder of line 10 through "CASES" on line 11

2. Title, line 11, following ";"
Strike: "AND"
FOLLOWING: "MCA"
Insert: "; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY PROVISION"

3. Pages 4 and 5.
Following: "~~other~~" on page 4, line 12
Strike: remainder of line 12 through line 4 on page 5
Insert: "(1) In an action involving the negligence of more than one person, the trier of fact shall determine the percentage of negligence attributable to each person whose actions contributed to the damages. Such persons may include but need not be limited to the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant.

(2) Judgment must be entered against each defendant in an amount representing his proportionate share of the claimant's total damages unless the defendant:
(a) has been released by the claimant;
(b) is immune from liability to the claimant; or
(c) has prevailed against the claimant on any other individual defense.

(3) The liability of a defendant is several only, except that one defendant may be responsible for the fault of another if both acted in concert in contributing to the claimant's damages or if one defendant acted as an agent of the other."

THIRD reading copy (BLUE color)

REP. MERCER WILL CARRY THE BILL!

4. Page 6, lines 5 through 13.
Strike: lines 5 through 13 in their entirety

5. Page 6.
Following: line 19
Insert: "NEW SECTION. Section 4. Effective date -- applicability. (1) This act is effective July 1, 1987.

(2) This act applies to causes of actions arising on or after July 1, 1987."

Form CS-32
Rev. 1985

STATUS SHEET

50th LEGISLATIVE SESSION

JUDICIARY COMMITTEE

SENATE BILL NUMBER	ENTERED COM. DATE	DATE CONSIDERED	OUT OF COM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMENDED DATE	DO NOT PASS AS AMENDED DATE	BE CONCURRED IN DATE	BE NOT CONCURRED IN DATE	BE CONCURRED IN AMENDED DATE	BE NOT CONCURRED IN AS AMENDED DATE
11		3/3/87	3/3/87					3/3/87			
20		3/12/87						3/13/87			
24		3/3/87							3/10/87		
25		3/3/87							3/10/87		
40		3/11/87						3/13/87			
48		3/15/87	tabled 3/27/87							reconsidered 4/8/87	
49		3/4/87								3/19/87	
✓ 51		3/10/87								3/20/87	
57		3/4/87	3/4/87					3/4/87			
58		3/10/87	3/11/87	tabled							
77		3/5/87	3/5/87					3/5/87			
88		3/5/87 3/11/87	3/5/87					3/5/87 3/19/87			
92 94		3/11/87 3/11/87						3/19/87 3/13/87			
96		3/11/87						3/17/87			

JUDICIARY COMMITTEE

50TH LEGISLATIVE SESSION

1987

Committee Members	District
Rep. Earl Lory, Chairman	59
Rep. John Mercer, Vice Chairman	50
Rep. Kelly Addy	94
Rep. Dave Brown	72
Rep. Tom Bulger	37
Rep. John Cobb	42
Rep. Fritz Daily	69
Rep. Paula Darko.	2
Rep. Ralph Eudaily	60
Rep. Leo Giacometto	24
Rep. Bud Gould	61
Rep. Ed Grady	47
Rep. Tom Hannah	86
Rep. Vernon Keller	83
Rep. Al Meyers	53
Rep. Joan Miles	45
Rep. Paul Rapp-Svrcek	51
Rep. Bill Strizich	41

Secretary

Renee Podell

Staff

John McMaster

SENATE BILL NO. 195: Rep. Bulger moved that SB 195, BE CONCURRED IN. Question was called and a voice vote was taken. The motion CARRIED unanimously. SB 195, BE CONCURRED IN.

SENATE BILL NO. 225: Rep. Addy moved BE CONCURRED IN. Rep. Gould asked Rep. Addy if this bill will make it so that prenuptial agreements will mean something. Rep. Addy pointed out that it will give them greater weight in divorce proceedings. Rep. Keller questioned section 8 in regard to a prenuptial agreement not being enforceable if a party does not disclose all financial property. Rep. Addy stated he feels it will be covered. Question was called and a voice vote was taken. The motion CARRIED 14-2 with Reps. Cobb and Brown dissenting. SB 225, BE CONCURRED IN.

SENATE BILL NO. 51: Senator Brown, District No. 2, sponsor, stated this bill deals with a subject area that is not new. It revises the laws relating to liability in certain cases. It also eliminates joint liability. He pointed out that section 1 of the bill clarifies that negligence would be compared to all of the parties that have contributed to the injury. Section 2 on page 4 contains the real change in the law. The bill eliminates the concept of joint liability for a person 25% or less negligent. The bill also clarifies that total damages are based on the negligence of all persons involved in determining individual liability.

PROPONENTS: JIM ROBISCHON, Montana Liability Coalition, stated the cornerstone to legislative tort reform in Montana has to involve a law that matches liability for the payment of damages in tort to the degree of fault for the party to pay the damages. SB 51 is a step in the right direction but falls short of the goals of the Liability Coalition in this the most important of matters to be presented to this session.

H.S. HANSON, Montana Technical Council, acknowledged that any bill on tort reform is better than what Montana has had in the past. Joint and several liability leads to a search for a "deep pocket" and has made governments, large corporations and other insured entities bear the greatest burdens of liability when their involvement in an injury is minimal. The only exception where joint liability should be retained shall be where the defendants acted in concert. Joint liability shall be imposed on all who pursue a common plan or design to commit a tortuous act or actively take part in it. He submitted written testimony as Exhibit A. He also submitted an Application of the Doctrine of Joint and Several Liability. (Exhibit B).

GERALD J. NEELY, Montana Medical Association, believes there is a difficulty with the circumstance where an injured party being negligent can bring an action against more than one individual and recover the entire judgement from an individual that is not only less negligent than all of the other defendants but can also be less negligent than the plaintiff. He stated there is a connection between the passage of the legislation and the downward impact of the cost of insurance.

DAN HOVEN, Attorney, Helena, representing Montana Municipal Insurance Authority, explained this bill gives us tools to work with and he supports this legislation because it retains the right of the jury.

ALEX HANSON, Montana League of Cities and the Montana Municipal Insurance Authority, pointed out it is very important to the cities of Montana to have protection as provided by this bill. This program must work or so many of the Montana cities will not have insurance, he said. The limit provided for in SB 51 is reasonable.

KAY FOSTER, Chamber of Commerce of Billings, and is appearing on behalf of the Governors Council of Economic Development stated she chaired the insurance subcommittee for the Governor's Council. Of the six legislative recommendations that the subcommittee made was "that Montana's doctrine of joint and several liability be changed so that defendants are responsible only to the degree that they are found to be negligent". The present bill does not go that far but is moving in the right direction. She requested the amendments be considered.

KATHY IRIGOIN, State Auditor's Office and Commissioner of Insurance, supported this legislation. SB 51 clarifies the instances in which the amounts for which insurance companies may potentially be libel.

JOHN MAYNARD, Tort Claims Division for the State of Montana, stated he supports the fair compromise of this bill.

LORNA FRANK, Montana Farm Bureau, stated she supports legislation that forbids joint and several liability judgements that forces a marginally responsible defendant to pay the entire amount of the claim. The Bureau supports the amendments.

BRUCE W. MOERER, Montana School Board Association, pointed out this is a fair bill that makes defendants responsible only for their own negligence.

BILL LEARY, Montana Hospital Association, supports the bill and amendments.

CHIP ERDMAN, Montana Savings and Loan Association, stated they support this bill but it probably does not go far enough. They are in support of the amendments.

ROGER TIPPY, Beer and Wine Wholesales Association, supports the introduced bill and the amendments.

(See attached Visitor's Register for further listed proponents.)

OPPONENTS: KARL ENGLAND, Montana Trial Lawyers Association, pointed out that joint and several liability is a simple concept based upon a relative and simple principal. It is only when you have to apply this simple concept to a complicated fact situation or when you have to apply it to the hundreds of different kinds of ways that people are hurt, each one different, that the simple concept gets complicated. He stated that joint and several liability shifts the burden of collecting from any other wrongdoers from the injured to the defendant. If one defendant cannot pay the judgement, the burden falls upon the other wrongdoers, rather than the injured. The problem should fall upon those who caused the injury and not upon those who are injured.

JOHN C. HOYT, Attorney, Great Falls, pointed out that during the special session, the insurance industry brought in a man from San Francisco who spoke on this subject and eluded to a case where the city was found libel and paid a judgement where its' responsibility was only 1%. Mr. Hoyt explained that he agreed that it is wrong. A 1% fault should not be responsible for all the damages an injured person sustains. In principal, where there is a wrong, he feels there should be a remedy. If the threshold was 15%, it will only effect 2% of the people, he said. Since less than 2% will be effected, it is not attorney's greed that would be affected in SB 51, because that impact is minimal to their incomes. The word "person" rather than the word "party" has been used in this bill and that involves the empty seat situation and this is not fair to the injured person and it does not serve a fair purpose for anyone, Mr. Hoyt explained. He strongly urged that this change be made in the bill in the interest of a workable and fair compromise.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 51: Rep. Addy asked Mr. Robischon if the defendants liability is limited to their percentage of fault, should we take the limitation off if the plaintiff is 50% or greater negligent or responsible for his own injuries. Mr. Robischon stated that,

"yes" that would be a version of pure comparative fault. Rep. Addy asked him if we should go to a pure fault concept and Mr. Robischon stated that he personally favors that. Rep. Miles asked Mr. Robischon if the amendments will return it to the original language of the bill. He stated, "yes, with the exception that we are going to eliminate from the amendments the concepts and references to fault and products liability matters that were carried in the bill, that was in the interim committee and that was originally in Senate Bill 51". Rep. Miles asked him if the amendments were proposed in the Senate and he stated that the bill that was written in the Senate was what was proposed.

Senator Brown closed the hearing on SB 51 by stating that this is an intriguing subject. The reason the Senate arrived at the 25% is to eliminate the problem of the defendant, the person who is 1% or 5% at fault. he stated that the committee may want to change the 25%, if they can find other solutions. He pointed out that the suggested change of language that Mr. Hoyt discussed can be looked at like a pie. The Senate felt that the person concept can not be ignored, if the person is partly responsible or partly negligent.

SENATE BILL NO. 58: Senator Pensoneault, District No. 27, stated this bill allows the plaintiff and defendant in a civil action, after liability has been determined, to each, provide the jury with a proposed damage award amount from which the jury shall choose one as the damage award. He pointed out that this does not take away the plaintiff's rights to have his damages determined by a jury.

PROPONENTS: GLENN DRAKE, Attorney, Helena, stated he supports SB 58 because it can do no harm since it is not mandatory. It has a good potential for doing good in the settlement of cases prior to being submitted to juries.

OPPONENTS: None

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 58: Rep. Meyers asked if someplace in the bill it provides for the judge to determine the size of an award and he asked Senator Pinsoneault to comment. He stated he felt Senator Pinsoneault was talking about punitive damages and it would not apply because it would be treated separately.

Rep. Lory stated it sounds like we have taken collective bargaining's final offer and Senator Pinsoneault stated this is baseball arbitration.

Senator Pinsoneault pointed out this bill adds an element of gamemanship and on a serious note, knowing that this is a

VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE BILL NO. 51 DATE March 10, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
John C Hoyt	Hoyt + Blewett		✓
Tim Robertson	Montana Building Association	✓	
Kathy Irigoin	State Auditor's Office	✓	
Ted Collins	ASARCO Inc	✓	
Bill Leary	Mont. Hosp Assn	✓	
[illegible]	SSBA	✓	
Roger McGlenn	Independent Insurance Agents Assoc of MT	✓	
H.S. Hanson	MT Teed Council	✓	
General Neely	Mont Pet Assn	✓	
Lorna Frank	Mont Farm Bureau	✓	
Roger Tippy	Beer & Wine Wholesalers Assn	✓	
Dan Hoven	Mont Motor Inn Assn	✓	
Kay Foster	Gov Council on Economic Development + Bus Incumbent	✓	
Kim Van Arsdale	C of C of Billings	✓	
Ann Wenger Rice	MT Assn of Defense Counsel	✓	
	MT Health Care Assn	✓	
Gordon Morris	MACo	✓	
Bryan Eisele	Missoula Chamber of Com	✓	
BRIAN CINI	MT. Medical Assn	X	

JOHN MAYNARD ERIC CLARK

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

American Consulting Engineers Council
1015 Fifteenth Street, N.W., Washington, D.C. 20005 202-347-7474

17
3-11-87
SB # 51

File #210.15
January 30, 1987

RECEIVED
FEB - 2 1987
MORRISON—MAIERLE

Mr. John H. Morrison, Jr.
President
Consulting Engineers Council
of Montana
P.O. Box 2128
Great Falls, Montana 59403

Dear Mr. Morrison:

In response to your January 19th letter, I have attempted to answer your questions in this correspondence and have enclosed several documents which may be helpful.

First of all, I have reviewed Montana Senate Bill No. 51 and congratulate the drafters of the bill on a fine job. I'm not surprised that the legislation is opposed by the trial lawyers because of the good job you've done.

Montana is not alone in having trial lawyers and other parties attempting to set percentage of fault thresholds on joint and several liability legislation. I have reviewed numerous pieces of pending legislation and draft legislation which repeal joint and several liability for only those defendants below a certain percentage of fault. Of course, the best piece of legislation is one that repeals joint and several liability across the board, similar to SB 51. If it is necessary to compromise, however, it goes without saying that we suggest the highest percentage of fault as possible.

While I have in my possession several pending bills, I am not forwarding any to you with this correspondence. I assume that unpassed legislation does not nearly have the impact on your legislators as bills which have been enacted and signed into law. Consequently, I am enclosing seven joint and several modification laws, most of which were enacted just last year.

The laws in Colorado and Vermont are two of the best as they abolish the concept of joint and several liability. The Iowa law might be of most interest to you because it repeals joint and several liability for defendants who are less than 50% negligent. The Alaska law does not repeal joint and several liability, but it gives some protection to defendants who are less than 50% at fault. The law states that those defendants may not be jointly liable for more than twice their percentage of fault. The Washington and Hawaii laws also repeal joint and several liability with certain exceptions. The exception in the Washington law is that joint and several liability will apply only if the plaintiff has no fault at all. Finally, the Florida law repeals joint and several liability for non-economic damages, and applies the doctrine of joint and several liability for economic damages only if the defendant's fault equals or exceeds that of a plaintiff's.

EXHIBIT

JOINT AND SEVERAL LIABILITY

Originally, joint and several liability meant that people who act with a common purpose, in concert, to commit an unlawful action against one party should have the actions of one considered as the actions of all. Juries were not allowed to apportion fault between tortfeasors, because it was considered impossible to divide what was seen as an indivisible wrong. Each was therefore liable for the entire damage, although one person may have contributed more or less than the other.

Today joint and several liability has been greatly expanded. Joint and several liability has been applied in the absence of concerted action to make all defendants who have had any part in an action -- jointly and severally liable. All that is required is that there be a tacit understanding that the action is or will be occurring. In some instances, statements of mere knowledge by each party of what the other is doing is sufficient "concert" to make each liable for the acts of the other.

Modern joint and several liability can be inequitable because a defendant with only a small or deminimus percentage of fault can become liable for 100% of the plaintiff's damages. Joint and several liability leads to a search for a "deep pocket" and has made governments, large corporations, and other insured entities bear the greatest burdens of liability when their involvement in an injury is minimal.

REFORM PROPOSAL

States should adopt pure several liability. Under pure several liability in any case involving unintentional torts, the trier of fact must apportion to each person or entity, whether or not a party to the action, the percentage for which he/she is responsible for the damages awarded. Each party to the suit will be liable only for the portion of damages assessed to them.

The only exception where joint liability should be retained shall be where the defendants acted in concert. Joint liability shall be imposed on all who pursue a common plan or design to commit a tortious act or actively take part in it. Any person held jointly liable for actions in concert shall have a right of contribution from his fellow defendants acting in concert. A defendant shall be held responsible only for the portion of fault assessed to those with whom he acted in concert.

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3-10-87
SB 51

I hope that these existing laws will give you an idea of what other state legislatures have done. If your political experts advise you that legislation similar to SB 51 or the Vermont and Colorado laws is impossible to pass, you might consider something similar to the Iowa law.

In your correspondence you also asked if I had any arguments against the setting of a percentage or any other information which may help you in your endeavor. The best thing I've found is the enclosed short white paper on joint and several liability written and produced by the American Tort Reform Association. I have also enclosed, just in case you haven't seen it, a copy of the ACEC model legislation on joint and several liability.

I hope that this information will be of some help to you. We would be happy to provide you with any other materials, resources and services as you work with your legislature. Please call on me if you feel that we can be of further assistance. Best wishes for a successful outcome.

Sincerely yours,

Bob Fogle

Robert L. Fogle
Director, Liability Legislation

RLF:el
enclosures
cc: Holly Tucker

APPLICATION OF THE DOCTRINE OF JOINT AND SEVERAL LIABILITY

EXHIBIT B
DATE 3-11-87
SB # 51

I. $100,000 judgment -- Current law

P	0%	D (1)	10%
		D (2)	40%
		D (3)	50%

P can collect $100,000 from D (1), D (2), or D (3) or P can collect from all three D, but P can only collect once. If P collects $100,000 from D (2), D (2) can collect $10,000 from D (1) and $50,000 from D (3).

II. $100,000 judgment -- SB 51 Third Reading Copy

Same situation as I. above

P can collect $100,000 from D (2) or D (3), but P can only collect $10,000 from D (1). If P collects $100,000 from D (2), D (2) can collect $50,000 from D (3) and $10,000 from D (1). D (1) is severally liable only.

III. $100,000 judgment -- Elimination of Joint Liability

Same situation as I. above

P can only collect $10,000 from D (1), $40,000 from D (2) and $50,000 from D (3). If D (3) is insolvent, P only collects $50,000.

IV. $100,000 judgment -- Current Law

P	10%	D (1)	20%
		D (2)	30%
		D (3)	40%

P's $100,000 judgment is reduced by the percentage of negligence attributed to P. Thus, P can only recover $90,000 and can recover this amount from D (1), (2) or (3), but can only recover once. Any D who pays more than the amount attributed to it has the right of contribution.

V. $100,000 judgment -- SB 51 Third Reading Copy

Same situation as IV. above

P can recover $90,000 from D (2) or D (3), but can only recover $20,000 from D (1). D (2) and D (3) have the right of contribution if they pay more than the amount attributed to them.

VI. $100,000 judgment -- Elimination of Joint Liability

Same situation as IV. above

P can only recover $20,000 from D(1), $30,000 from D(2) and $40,000 from D(3). If D(3) is insolvent, P recovers only $50,000.

VII. $100,000 judgment -- Current Law

P 30% D(1) 20%
       D(2) 50%

P's $100,000 judgment is reduced by 30% and either P cannot collect against D(1) or P can collect against either D(1) or D(2) but P can only collect once.

VIII. $100,000 judgment -- SB51 Third Reading Copy

Same situation as VII. above

P's $100,000 judgment is reduced by 30% and D(1) is severally liable only. D(2) is jointly liable and if P collects more than $50,000 from D(2), D(2) has the right of contribution.

IX. $100,000 judgment -- SB 51 Third Reading Copy

P 0% D(1) 20%
      D(2) 20%
      D(3) 30%
      X   10%
      Z   20%

D(3) is jointly liable. D(1) and D(2) are severally liable only and the jury is allowed to apportion negligence to X and Z even though none of the parties sought to join them in the suit. Thus, if D(3) is insolvent, P collects only $40,000.

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 10, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)		✓	
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

CS-30

MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

March 20, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on March 20, 1987, at 8:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Cobb who was excused and Rep. Hannah who was absent.

EXECUTIVE SESSION:

ACTION ON SENATE BILL NO. 51:

Rep. Mercer moved that SB 51, BE CONCURRED IN. He moved amendments from the subcommittee. The amendments eliminate the threshold of 25%, less or more, responsibility of fault. They also preserve the 50 or 51% fault as a plaintiff where there would be no recovery, Rep. Mercer explained. Rep. Addy stated that the 25 or 50% negligence is a question of whether or not it is apportioned between the parties or among all persons involved in the fact pattern and that might include an empty chair in the courtroom. He disagreed with the language used in the bill in regard to using the word "persons". He further stated that when it comes to eliminating the 25% threshold that will cause the bill to have rough sailing through the Senate and it would be better to leave the bill the way it is all the way around and then there would not be any reason to argue about the language in the bill with regard to "persons" and "parties". Rep. Miles pointed out that Rep. Addy is correct. She stated that the Senate has hammered this out and they will not compromise. The cities and towns are in support of this bill the way it is because it is a point between two worlds and neither side should get everything.

Rep. Meyers stated that the House should do what they think is best on a bill and not what they think the Senate wants them to do. Rep. Giacometto acknowledged that a person should not have to pay more than they are found libel for by the court and we must think of our cities and towns and protect them.

Rep. Addy questioned Rep. Giacometto in regard to cities and towns being 25% negligent and the plaintiff 74 or 75% negligent, should the defendant have to pay that 25%. Rep. Giacometto stated that he would leave that up to the jury. Rep. Addy commented that that is a good idea and pointed out

that it should be taken out of the bill so the jury can decide that.

Rep. Rapp-Svrcek pointed out that there were a number of people who testified in favor of the bill and some of them talked about changing the threshold to 50% but no one talked about pulling the threshold out of the bill altogether.

Rep. Mercer pointed out that the House does what they think is right and the Senate does what they think is right and that is the purpose of having a House and Senate. If the two cannot agree, then that is where a compromise comes in, he said. Rep. Mercer further stated that the amendments being proposed are correct. The 25% threshold is nothing more than a compromise that is going to be confusing to juries and it really does not have a great deal of basis in theory. He stated that we must think about what our theory of justice is: Is it that a person should be responsible to the extent of their action; then you cannot justify a 25% threshold because you would have a case where someone is 25% responsible and another defendant was 75% responsible and if the 75% defendant had no money then the 25% defendant would pay 25% of the damages and no more. That is the Senate version of the bill. If the defendant was 26% responsible then he would pay the whole thing. The proposed amendments say: If a defendant is 25% responsible then he pays 25%, and if he is 26% responsible then he pays 26%. He stated that Rep. Addy suggests that we follow this through theoretically and be sure and allow a 90% responsible plaintiff to file a law suit to recover 10% against the defendant even though he is 90% at fault. Rep. Mercer further stated that he agrees with that from a theoretical standpoint but from a justice standpoint, he feels, at some point we must tell people that they must be responsible for their own actions. The 50% line has been in Montana for a long time and it has worked well, he said.

Rep. Addy stated that Rep. Mercer's theory is a pretty one-sided theory of justice. He gave an example to the committee of a driver who does not have any insurance and does not have any assets and you can get a judgement against him, but you cannot collect. If there is a dump truck that is 30% negligent and has all kinds of insurance, the dump truck will only have to pay 30%, which means that 70% of the burden then falls on the plaintiff rather than on the parties that were more responsible than they, he said, and that is what we are doing with this amendment. Rep. Bulger pointed out that we are here to be fair and if someone is 1% libel and someone else is 99% libel then it is not fair that the 1% responsible person pay all of the burden. He stated that it appears the Senate was trying to be fair and if this

bill leaves the committee with the proposed amendments, he can't see any compromise.

Rep. Mercer stated that the confusion comes into play when someone without money harms another person, which is unfair but it is also unfair to take that fact of not having money shift it over onto someone else just because they were partially responsible. Rep. Bulger pointed out that we are trying to balance competing interests and it is not a perfect world and if it were, then everyone would have great insurance and no one would get injured by a negligent act of someone else. This is an attempt to come to terms with those two competing interests, he said. Rep. Mercer stated that this is not the test in this bill. As the bill came over from the Senate, it could be 49% your fault as the plaintiff and 26% my fault and 25% someone else's fault and I end up paying 51% of the damages.

Chairman Lory asked if there is an assumption that the injured person must be protected at any cost. If we are talking about fairness, and someone is only 15% responsible the amendments say, that the assumption, is that the injured party is going to be helped at any cost. Rep. Addy stated that the injured party is not going to be able to shift that burden because he is going to always be hurt and the question is whether that burden that has been arbitrarily thrust upon him should not be shifted to others that are more at fault than they are or who are 26% at fault.

Rep. Rapp-Svrcek moved to amend Rep. Mercer's amendments by striking the 25% and inserting 50% because he stated that the 50% is fair and closer to reality since it is a reasonable recovery and it protects the defendant, and to amend striking amendment number 2 in its entirety.

Rep. Daily agreed that 25% is not fair to everyone, 50% is a good compromise and it helps both sides. Rep. Addy stated that he disagrees with Rep. Rapp-Svrcek's amendments. Question was called and a roll call vote was taken on the amendments moved by Rep. Rapp-Svrcek. The motion FAILED 8-10. (Roll Call Vote Attached).

Rep. Miles pointed out that all session we have tried to figure out how we can take the burden off the people, insurance companies and the parties at fault and get them out from under this burden. Rep. Meyers said that he feels this is a compromise bill.

Rep. Addy explained that we have to do something and have to observe a compromise.

Rep. Kapp-Svrcek pointed out that Rep. Mercer's amendments go too far. Rep. Giacometto stated that this bill does not do anything to help the insurance companies but it does help the people of the state of Montana. Rep. Mercer stated that America is a land of liberty and liberty is based on responsibility for your own actions. The tort system was founded on a concept of being responsible for your own actions and America has shifted from that idea to an idea of a no fault system. America must return to the fault system where a person is responsible for their own action.

Question was called on the amendments. A roll call vote was taken. The motion CARRIED 10-8. (See Roll Call Vote and Amendments attached). Rep. Mercer moved that SB 51, BE Concurred IN AS AMENDED. A roll call vote was taken and the motion CARRIED 10-8. (See Roll Call Vote Attached). SB 51, BE CONCURRED IN AS AMENDED.

SENATE BILL NO. 139, Senator Smith, District No. 10, stated that this is an act defining the responsibility and liability of snowmobile area operators and the responsibility and risk borne by snowmobilers. He pointed out that this bill is necessary for the state of Montana if it is to continue to have recreational snowmobiling.

PROPONENTS:

KEN HOOVESTOL, Chairman of the Legislative Committee for the Montana Snowmobile Association, stated that the Snowmobilers Responsibility Act, SB 139, is to make the snowmobiler responsible for his or her own actions and to limit the liability to the snowmobile operator. The bill is patterned after the down hill Skier Responsibility Act.

DICK JOHNSON, presenting testimony on behalf of Jim Flynn, Department of Fish, Wildlife and Parks, stated that as a state agency responsible for the management of snowmobile recreation in Montana, the Department applauds the initiative of the Montana Snowmobile Association in their efforts to bring equity to the distribution of liability responsibility among participants and providers involved with recreational snowmobiling. Passage of SB 139 will help to ensure that unreasonable liability responsibilities will not deprive Montana snowmobilers of land, facilities, and groomed trails upon which to enjoy their sport. He submitted written testimony. (Exhibit A).

DENNIS OGLE, Montana Snowmobile Association, District Director, Helena, explained that Montana currently has approximately 2000 miles of groomed snowmobile trails and many of the miles are on private lands. He stated that they support this bill because it will help to eliminate some

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE March 20, 1987 SENATE BILL NO. 51 TIME 9:14 A.M.

NAME	EXCUSED	AYE	NAY
JOHN MERCER			✓
LEO GIACOMETTO			✓
BUDD GOULD			✓
AL MEYERS			✓
JOHN COBB			✓
ED GRADY			✓
PAUL PAPP-SVRCEK		✓	
VERNON KELLER			✓
RALPH EUDAILY			✓
TOM BULGER		✓	
JOAN MILES		✓	
FRITZ DAILY		✓	
TOM HANNAH	PROXY		✓
BILL STRIZICH		✓	
PAULA DARKO		✓	
KELLY ADDY		✓	
DAVE BROWN		✓	
EARL LORY			✓
TALLY		8	10

Agnes J. Rodell
Secretary

Earl Lory
Chairman

MOTION: AMENDMENT / REP. PAPP-SVRCEK

DEFEATED

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE March 20, 1987 SENATE BILL NO. 51 TIME 9:21 A.M.

NAME	EXCUSED	AYE	NAY
JOHN MERCER		✓	
LEO GIACOMETTO		✓	
BUDD GOULD		✓	
AL MEYERS		✓	
JOHN COBB	Proxy	✓	
ED GRADY		✓	
PAUL PAPP-SVRCEK			✓
VERNON KELLER		✓	
RALPH EUDAILY		✓	
TOM BULGER			✓
JOAN MILES			✓
FRITZ DAILY			✓
TOM HANNAH	Proxy	✓	
BILL STRIZICH			✓
PAULA DARKO			✓
KELLY ADDY			✓
DAVE BROWN			✓
EARL LORY		✓	

TALLY 10 8

Secretary

Earl Lory
Chairman

MOTION: MERCER AMENDMENTS

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE March 20, 1987 SENATE BILL NO. 51 TIME 9:26 A.M.

NAME	EXCUSED	AYE	NAY
JOHN MERCER		✓	
LEO GIACOMETTO		✓	
BUDD GOULD		✓	
AL MEYERS		✓	
JOHN COBB		✓	
ED GRADY		✓	
PAUL RAPP-SVRCEK			✓
VERNON KELLER		✓	
RALPH EUDAILY		✓	
TOM BULGER			✓
JOAN MILES			✓
FRITZ DAILY			✓
TOM HANNAH		✓	
BILL STRIZICH			✓
PAULA DARKO			✓
KELLY ADDY			✓
DAVE BROWN			✓
EARL LORY		✓	
TALLY		10	8

Gerald J. Adell
Secretary

Earl Lory
Chairman

MOTION: BE CONC. IN AS AMENDED

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 12, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)		✓	✓
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)		✓	
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

CS-30

COMMITTEE OF THE WHOLE AMENDMENT

'67

HOUSE

3-26-87
DATE

11:15
TIME

MR. CHAIRMAN: I MOVE TO AMEND SB 51

3rd reading copy (blue Color) as follows:

PASSED

AMENDING THE HOUSE JUDICIARY STANDING COMMITTEE REPORT DATED 3-20-87, WHICH AMENDED SB 51.

1) Amending Instructions No. 1, 3, and 4
Strip Instructions No. 1, 3, and 4 in their entirety

2) Page 4, line 19 (of the bill).
Strike: " 25% "
Insert: "50%"

3) Page 6, line 11 (of the bill).
Strike: " 25% "
Insert: "50%"

ADOPT
REJECT

L. Rapp-Svrcek

3261115T.CW

Rep. Rapp-Svrcek

SENATE BILL NO. 51

INTRODUCED BY B. BROWN, THAYER, THOMAS, J. BROWN, IVERSON

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE

ON LIABILITY ISSUES

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE LAWS RELATING TO LIABILITY; ~~SUBSTITUTING THE DOCTRINE OF COMPARATIVE FAULT FOR THE DOCTRINE OF COMPARATIVE NEGLIGENCE;~~ ELIMINATING JOINT LIABILITY; ~~PROVIDING FOR THE APPORTIONMENT OF FAULT AMONG JOINT TORTFEASORS~~ IN CERTAIN CASES; ~~AND~~ AMENDING SECTIONS 27-1-702 AND 27-1-703, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY PROVISION."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-1-702, MCA, is amended to read:

"27-1-702. Comparative ~~negligence~~ fault NEGLIGENCE -- extent to which contributory ~~negligence~~ fault NEGLIGENCE bars recovery in action for damages. ~~(1)~~ Contributory ~~negligence~~ fault NEGLIGENCE shall not bar recovery in an action by any person or his legal representative to recover damages for ~~negligence resulting in~~ NEGLIGENCE RESULTING IN death or injury to person or property if such ~~negligence~~ ~~contributory fault~~ NEGLIGENCE was not greater than the ~~negligence~~ fault NEGLIGENCE of the person or the combined fault NEGLIGENCE of all persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of ~~negligence~~ fault NEGLIGENCE attributable to the person recovering ~~or for whose death or injury to person or property recovery is made~~.

~~(2) "Fault" includes acts or omissions that are in any measure wrongful, unlawful, negligent, or reckless or that subject a person to strict tort liability. The term also includes:~~

~~(a) breach of warranty;~~

~~(b) assumption of risk;~~

~~(c) misuse of a product; and~~

~~(d) failure to avoid or mitigate an injury, including failure to use safety devices.~~"

Section 2. Section 27-1-703, MCA, is amended to read:

"27-1-703. Multiple defendants ~~jointly and severally liable right of contribution apportionment of fault~~ -- DETERMINATION OF LIABILITY. ~~(1) Whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.~~

~~(2) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to~~

Montana Legislative Council

REFERENCE BILL

person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, M.R.Civ.P.

(3) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party.

(1) In an action involving the fault of more than one person, the trier of fact shall determine the percentage of fault attributable to each person whose actions contributed to the damages. Such persons may include but need not be limited to the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the

claimant.

(2) Judgment must be entered against each defendant in an amount representing his proportionate share of the claimant's total damages unless the defendant:

(a) has been released by the claimant;

(b) is immune from liability to the claimant; or

(c) has prevailed against the claimant on any other individual defense.

(3) The liability of a defendant is several only, except that one defendant may be responsible for the fault of another if both acted in concert in contributing to the claimant's damages or if one defendant acted as an agent of the other. (1) EXCEPT AS PROVIDED IN SUBSECTIONS (2) AND (3), WHENEVER THE NEGLIGENCE OF ANY PARTY IN ANY ACTION IS AN ISSUE, EACH PARTY AGAINST WHOM RECOVERY MAY BE ALLOWED IS JOINTLY AND SEVERALLY LIABLE FOR THE AMOUNT THAT MAY BE AWARDED TO THE CLAIMANT BUT HAS THE RIGHT OF CONTRIBUTION FROM ANY OTHER PERSON WHOSE NEGLIGENCE MAY HAVE CONTRIBUTED AS A PROXIMATE CAUSE TO THE INJURY COMPLAINED OF.

(2) ANY PARTY WHOSE NEGLIGENCE IS DETERMINED TO BE 25% 50% OR LESS OF THE COMBINED NEGLIGENCE OF ALL PERSONS DESCRIBED IN SUBSECTION (4) IS SEVERALLY LIABLE ONLY AND IS RESPONSIBLE ONLY FOR THE AMOUNT OF NEGLIGENCE ATTRIBUTABLE TO HIM, EXCEPT AS PROVIDED IN SUBSECTION (3). THE REMAINING PARTIES ARE JOINTLY AND SEVERALLY LIABLE FOR THE TOTAL LESS

THE AMOUNT ATTRIBUTABLE TO THE CLAIMANT.

(3) A PARTY MAY BE JOINTLY LIABLE FOR ALL DAMAGES CAUSED BY THE NEGLIGENCE OF ANOTHER IF BOTH ACTED IN CONCERT IN CONTRIBUTING TO THE CLAIMANT'S DAMAGES OR IF ONE PARTY ACTED AS AN AGENT OF THE OTHER.

(4) ON MOTION OF ANY PARTY AGAINST WHOM A CLAIM IS ASSERTED FOR NEGLIGENCE RESULTING IN DEATH OR INJURY TO PERSON OR PROPERTY, ANY OTHER PERSON WHOSE NEGLIGENCE MAY HAVE CONTRIBUTED AS A PROXIMATE CAUSE TO THE INJURY COMPLAINED OF MAY BE JOINED AS AN ADDITIONAL PARTY TO THE ACTION. FOR PURPOSES OF DETERMINING THE PERCENTAGE OF LIABILITY ATTRIBUTABLE TO EACH PARTY WHOSE ACTION CONTRIBUTED TO THE INJURY COMPLAINED OF, THE TRIER OF FACT SHALL CONSIDER THE NEGLIGENCE OF THE CLAIMANT, INJURED PERSON, DEFENDANTS, THIRD-PARTY DEFENDANTS, PERSONS RELEASED FROM LIABILITY BY THE CLAIMANT, PERSONS IMMUNE FROM LIABILITY TO THE CLAIMANT, AND ANY OTHER PERSONS WHO HAVE A DEFENSE AGAINST THE CLAIMANT. THE TRIER OF FACT SHALL APPORTION THE PERCENTAGE OF NEGLIGENCE OF ALL SUCH PERSONS. HOWEVER, IN ATTRIBUTING NEGLIGENCE AMONG PERSONS, THE TRIER OF FACT MAY NOT CONSIDER OR DETERMINE ANY AMOUNT OF NEGLIGENCE ON THE PART OF ANY INJURED PERSON'S EMPLOYER OR COEMPLOYEE TO THE EXTENT THAT SUCH EMPLOYER OR COEMPLOYEE HAS TORT IMMUNITY UNDER THE WORKERS' COMPENSATION ACT OR THE OCCUPATIONAL DISEASE ACT OF THIS STATE, OF ANY OTHER STATE,

OR OF THE FEDERAL GOVERNMENT. CONTRIBUTION SHALL BE PROPORTIONAL TO THE LIABILITY OF THE PARTIES AGAINST WHOM RECOVERY IS ALLOWED. NOTHING CONTAINED IN THIS SECTION SHALL MAKE ANY PARTY INDISPENSABLE PURSUANT TO RULE 19, MONTANA RULES OF CIVIL PROCEDURE.

(5) IF FOR ANY REASON ALL OR PART OF THE CONTRIBUTION FROM A PARTY LIABLE FOR CONTRIBUTION CANNOT BE OBTAINED, EACH OF THE OTHER PARTIES SHALL CONTRIBUTE A PROPORTIONAL PART OF THE UNPAID PORTION OF THE NONCONTRIBUTING PARTY'S SHARE AND MAY OBTAIN JUDGMENT IN A PENDING OR SUBSEQUENT ACTION FOR CONTRIBUTION FROM THE NONCONTRIBUTING PARTY. A PARTY FOUND TO BE ~~25%~~ 50% OR LESS NEGLIGENT FOR THE INJURY COMPLAINED OF IS LIABLE FOR CONTRIBUTION UNDER THIS SECTION ONLY UP TO THE PERCENTAGE OF NEGLIGENCE ATTRIBUTED TO HIM."

NEW SECTION. SECTION 3. SEVERABILITY. IF A PART OF THIS ACT IS INVALID, ALL VALID PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF THIS ACT IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

NEW SECTION. SECTION 4. EFFECTIVE DATE -- APPLICABILITY. (1) THIS ACT IS EFFECTIVE JULY 1, 1987.

(2) THIS ACT APPLIES TO CAUSES OF ACTIONS ARISING ON OR AFTER JULY 1, 1987.

-End-

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